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No. 08-1065

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA, JOSEPH HRVOL and DAVID RICHTER,

Petitioners,

v.

CURTIS W. McGHEE, JR. and TERRY J. HARRINGTON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE COOK COUNTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a prosecutor may be subjected to a civil trial and potential damages for a wrongful conviction and incarceration where the prosecutor allegedly violated a criminal defendant's "substantive due process" rights by procuring false testimony during the criminal investigation, and then the trial prosecutor introduced that same testimony against the criminal defendant at trial.

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INTEREST OF AMICUS

Amicus is the County of Cook, Illinois, the second largest county in the United States. The State's Attorney of Cook County is the chief legal officer for Cook County and is constitutionally and statutorily charged with representing Cook County in all civil litigation. *County of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 215 Ill. 2d 466, 831 N.E.2d 563 (2005). Cook County is responsible for paying settlements and judgments arising from constitutional and common law tort actions against county officials. *Carver v. Sheriff of La Salle County*, 203 Ill. 2d 497, 787 N.E.2d 127 (2003). The federal courts have expanded this principle from *Carver* and have held that Illinois counties are liable for judgments entered against State officials whose offices are funded by the counties. *Robinson v. Sappington*, 351 F.3d 317, 339 (7th Cir. 2003) *citing Pucinski v. County of Cook*, 192 Ill. 2d 540, 737 N.E.2d 225 (2000).

In Illinois, State's Attorneys and their assistants are State officials. *Hoyne v. Danisch*, 264 Ill. 467, 470-72, 106 N.E. 341, 342, 343 (1914); *Ingemunson v. Hedges*, 133 Ill. 2d 364, 369, 549 N.E.2d 1269, 1271, 1272 (1990). The outcome of this case will impact those assistant state's attorneys who are defendants in Section 1983 claims alleging that the State's Attorney's office procured false testimony during a criminal investigation and subsequently introduced that same testimony against a criminal defendant at trial. Consequently, Cook County has an interest in the resolution of this litigation because it bears financial responsibility for paying settlements and judgments in Section 1983 actions against assistant state's attorneys in their individual capacities.

The state's attorney is the legal representative of a county. As a result, Supreme Court Rule 37 allows *Amicus* to file a supporting brief without permission of the parties. Cook County, Illinois, therefore, respectfully submits this brief as *Amicus Curiae* in support of petitioners in accordance with Supreme Court Rule 37.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case presented by petitioners Pottawattamie County, Iowa; Joseph Hrvol and David Richter.

SUMMARY OF ARGUMENT

Prosecutors are absolutely immune in Section 1983 suits for damages relating to the initiation of a prosecution and presentment of the State's case. *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). In *Imbler*, this Court held that prosecutors are absolutely immune from suit based upon allegations that they use perjured testimony or withheld information relevant to the defense. *Accord Van de Kamp v. Goldstein*, 129 S. Ct. 855, 861 (2009).

Relying on *Imbler*, the district court dismissed claims against prosecutors Hrvol and Richter that were based on withholding of exculpatory evidence. The district court held that petitioners were absolutely immune from suit based upon such allegations because "failure to turn over exculpatory evidence is necessarily a function intimately associated with the judicial

process." *McGhee v. Pottawattamie County*, 475 F. Supp. 2d 862, 895-896 (S.D. Iowa 2007); Pet. App. 85a. Nonetheless, the district court also held that petitioners' "claims that the prosecutors manufactured, coerced, and fabricated evidence against them is sufficient to state a substantive due process claim." *McGhee*, 475 F. Supp. 2d at 904-905. The Eighth Circuit affirmed the decision of the district court. *McGhee v. Pottawattamie County*, 547 F.3d 922, 933 (8th Cir. 2008).

In so doing, the Eighth Circuit rejected the argument that only the use of false testimony, not its mere procurement, could have violated petitioners' constitutional rights, and that the use of such testimony at trial was shielded by absolute immunity. *McGhee*, 547 F.3d at 932-933; Pet. App. 17a-18a. As the petitioners correctly observe, by "denying *qualified* immunity for *procurement* of false testimony, the courts below went further and abrogated *absolute* immunity for the *use* of that testimony *at trial*." (Petitioners' Br. at 5.) Petitioners further argue that "respondents' claims arise solely from their trials, because they have alleged that they were wrongfully convicted"[1] and that the Eighth Circuit "should not have abrogated petitioners' absolute immunity where the alleged constitutional injury was a conviction in violation of due process."[2]

Amicus agree with petitioners that: (1) *McGhee* conflicts with this Court's jurisprudence as well as *Buckley v. Fitzsimmons*, 20 F.3d 789 (7th Cir.

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1. Petitioners' Br. at 20.

2. Petitioners' Br. at 5.

1994) ("*Buckley II*"),[3] in that the Eighth Circuit held that "acts taken *before* trial prospectively vitiate a prosecutor's absolute immunity *at* trial," Petitioners' Br. at 20, and (2) *Buckley II* yields the better result. *Amicus* will advance two additional arguments.

First, because the use of allegedly false testimony at trial — and not the procurement of such testimony before trial — caused respondents' injury, respondents cannot establish "loss causation," a necessary element of any constitutional tort claim. As the district court recognized, petitioners are absolutely immune from suit based upon the use of false testimony at trial. *McGhee*, 475 F. Supp. 2d at 895-896

Second, the Eighth Circuit's approach places a chilling effect on prosecutors' participation in the earliest stages of a criminal prosecution. Large prosecutor's offices frequently assign prosecutors to matters upon referral or inquiry from law enforcement agencies to evaluate the assembled evidence and determine whether such evidence supports the initiation of felony charges in a particular case. Indeed, the Eighth Circuit's

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3. *See* Petitioners' Br. at 17-20. *Buckley II* recognized that "[p]rosecutors are entitled to absolute immunity for actions as advocates before the grand jury and at trial even if they present unreliable or wholly fictitious proofs." *Buckley II*, 20 F.3d at 795, *citing Buckley v. Fitzsimmons*, 509 U.S. 259, 266 n.3 (1993) and *Burns v. Reed*, 500 U.S. 478, 489-490 & n.6 (1991). *Buckley II* also recognized that "no authority [exists] for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Buckley* II, 20 F.3d at 797, *citing Buckley*, 509 U.S. at 281 (Scalia, J., concurring).

opinion gives prosecutor offices, such as the Cook County State's Attorney's office ("CCSAO"), a profound disincentive to appear in the early stages of criminal prosecution. Such a result is contrary to what has been described as the "principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Imbler*, 424 U.S. at 435 (White, J., concurring in the judgment), *citing Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1872).

The CCSAO has a Felony Review unit ("Felony Review") within its organizational structure. Prosecutors assigned to Felony Review appear early in criminal matters, evaluate evidence and determine whether charges should be filed. Felony Review is a progressive reform designed to ensure that prosecutors get involved in a potential prosecution at a point where the police have accumulated evidence and have probable cause to arrest. The participation of prosecutors at this early stage weeds out non-meritorious cases, prevents pre-trial detention in such cases and promotes judicial economy by preventing meritless criminal prosecutions before they begin. The threat of collateral litigation, including the possible imposition of punitive damages, chills the efforts of such prosecutors.

The public benefits from the vigorous operation of felony review units (or prosecutors performing similar functions) in large prosecutor's offices throughout the nation. Absolute quasi-judicial prosecutorial immunity should not be a hollow promise to prosecutors assigned

to such duties, as that would undermine the prosecutorial function that those prosecutors perform. Consequently, and for the reasons set forth below, the judgment of the United States Court of Appeals for the Eighth Circuit should be reversed.

ARGUMENT

Respondents allege that petitioners Hrvol and Richter were prosecutors who coerced false testimony from third-party witnesses. Respondents further allege that the introduction of such testimony at trial violated their due process right to a fair trial. The procurement of the alleged false testimony did not cause respondents' injury; the use of such testimony at trial did. Respondents, therefore, cannot establish "loss causation," a necessary element of constitutional torts.

In addition, prosecutors function as a team. *See, e.g.*, *White v. City of Chicago*, 369 Ill. App. 3d 765, 777, 861 N.E.2d 1083, 1094 (1st Dist. 2006) (recognizing that the efforts of the trial prosecutors and supervisors who work with them are a "joint enterprise" and holding that a supervisor who interviewed a potential witness was absolutely immune from suit for such conduct); *see also* *Van de Kamp*, 129 S. Ct. at 862 (recognizing that trial prosecutors, their supervisors and colleagues would be absolutely immune from a suit alleging that *Brady* material should have been produced but was not). Under the Eighth Circuit's approach in *McGhee*, a prosecutor who takes a witness' statement early in the criminal process would not be absolutely immune from suit and,

yet, a trial prosecutor who introduces the statement at trial would be. *McGhee*, therefore, is not only inconsistent with *Van de Kamp* but also discourages large prosecutor's offices from early participation in the process (*i.e.*, the operation of a felony review unit for the purpose of marshalling evidence to initiate a felony prosecution and to present the case at trial). Such a result is incompatible with the public policy underlying absolute, prosecutorial immunity as set forth in *Imbler* and *Van de Kamp*.

A. The Eighth Circuit Opinion Should Be Reversed Because Respondents Cannot Establish Loss Causation And Because Their Claim Against Petitioners Regarding The Procurement Of False Testimony Is Not Actionable In Tort.

Respondents have advanced Section 1983 claims alleging that petitioners violated their due process right to a fair trial. Section 1983 "creates a species of tort liability." *Imbler*, 424 U.S. at 417. This Court has described Section 1983 "as creating a 'constitutional tort'." *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 728 (1999) (Scalia, J., concurring in part and concurring in the judgment). In this regard, "the ordinary rules of tort causation apply to constitutional tort suits." *Herzog v. Village of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002).

In *Bastian v. Petren Resources Corp.*, 892 F.2d 680 (7th Cir. 1990), the Seventh Circuit affirmed the dismissal of a securities fraud claim on the grounds that plaintiffs failed to allege loss causation and proximate cause. The Seventh Circuit stated that:

> "Loss causation" is an exotic name – perhaps an unhappy one (citation omitted) – for the

> standard rule of tort law that the plaintiff must allege and prove that, but for the defendant's wrongdoing, the plaintiff would not have incurred the harm of which he complains . . . If the defendants' oil and gas ventures failed not because of the personal shortcomings that the defendants concealed but because of industry-wide phenomena that destroyed all or most such ventures, then the plaintiffs, given their demonstrated desire to invest in such ventures, lost nothing by reason of the defendants' fraud and have no claim to damages.

Bastian, 892 F.2d at 685. The loss causation rule has been applied to constitutional tort claims for damages. *See, e.g., Niehus v. Librerio*, 973 F.2d 526, 531-532 (7th Cir. 1992) (noting that there "is no tort without an injury" and stating that this applies to constitutional torts as well as ordinary torts); *see also Zimmerman v. Cook County Sheriff's Department*, 96 F.3d 1017, 1019 (7th Cir. 1996) (stating that "[u]nless a defendant's wrong is a cause of the plaintiff's injury, there is no liability").

This Court has endorsed the interpretation of loss causation set forth in *Bastian*. *See Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 340 (2005) (adopting the views on loss causation expressed in *Bastian* and cases from the Second, Third and Eleventh Circuits). In *Dura*, this Court recognized that a plaintiff attempting to prove securities fraud must establish several elements, including transaction causation and loss causation. The Seventh Circuit

recently described the difference between transaction causation and loss causation:

> The distinction between 'but for' causation and actual legal responsibility for a plaintiff's loss is particularly well developed in securities cases, where it is known as the distinction between 'transaction causation' and 'loss causation.' Suppose an issuer of common stock misrepresents the qualifications or background of its principals, and if it had been truthful the plaintiff would not have bought any of the stock. The price of the stock then plummets, not because the truth is discovered but because of a collapse of the market for the issuer's product wholly beyond the issuer's control. There is 'transaction causation,' because the plaintiff would not have bought the stock, and so would not have sustained the loss, had the defendant been truthful, but there is no 'loss causation,' because the kind of loss that occurred was not the kind that the disclosure requirement that the defendant violated was intended to prevent.

Maxwell v. KPMG, LLP, 520 F.3d 713, 717 (7th Cir. 2008). Respondents claim that "but for" the procurement of the alleged coerced testimony from several witnesses, they would not have been convicted of murder. That may establish "transaction causation" but it does not establish "loss causation." In other words, the procurement of the false testimony did not cause the injury; rather, the use of such testimony at trial did.

Moreover, as petitioners have argued, the proscription against perjured testimony is a trial right. (Petitioners' Br. at 9, 10, *citing Pyle* v. *Kansas*, 317 U.S. 213, 216 (1942) and *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935).) It is the use of material, false testimony — and not any antecedent act, such as the alleged procurement of the false testimony — that violated respondents' due process rights. Respondents are not entitled to recover in tort for conduct that did not violate their due process right to a fair trial. *Carter v. United States*, 333 F.3d 791, 797 (7th Cir. 2003). In *Carter*, the Seventh Circuit stated:

> An injury resulting from the violation of a statute (or other source of a legal duty, such as the regulation concerning treatment options on which the plaintiff relies) is actionable under tort law only if the statute was intended to avert the kind of injury that occurred. In the leading case of *Gorris v. Scott*, 9 L.R.-Ex. 125 (1874), a hardy antique, the plaintiff's animals, while being transported on the defendant's ship, were washed overboard and drowned when a storm struck it. The ship was not equipped with pens that were required by a statute in order to prevent the spread of disease among the animals. Had there been pens, the animals would have been saved from a watery death. The suit for their loss was based on the statutory violation and failed because the statute was not aimed at preventing animals from being washed overboard.

Carter, 333 F.3d at 797. *See also Townes v. City of New York*, 176 F.3d 138, 148 (2nd Cir. 1999), *citing* C. Jeffries,

Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1475 (1989) (concluding "that constitutional tort liability under Section 1983 is limited to 'the kind of injury that the [constitutional right at issue] was designed to prevent'").

The due process right to a fair trial is not aimed at the pre-trial procurement of false statements but instead at the use of such statements at trial. The constitutional tort claims that respondents have filed for the alleged preparation of false evidence are simply not actionable.

B. The Eighth Circuit Opinion Is Contrary To *Van de Kamp* And Discourages Prosecutors From Performing Prosecutorial Functions, Such As Interviewing Witnesses And Evaluating Evidence, During An Early Stage Of Criminal Prosecution.

In its opinion below, the Eighth Circuit held that allegations that prosecutors had coerced false testimony from witnesses that was later introduced at trial and resulted in respondents' convictions were sufficient to state a substantive due process claim against the prosecutors. *See McGhee*, 547 F.3d at 933. If affirmed, this decision would shift liability backwards —from the otherwise immune trial conduct of a prosecutor in presenting allegedly fabricated evidence to the conduct of that prosecutor leading up to trial in obtaining or preparing the evidence which caused plaintiff's injury at trial. Such a result is surely contrary to this Court's holding in *Van de Kamp* that a plaintiff could not sue the supervisors of prosecutors regarding the training

of trial prosecutors about the requirements of *Brady v. Maryland*, 373 U.S 83 (1963), where the trial prosecutors were absolutely immune from suit based upon alleged *Brady* violations.

McGhee raises substantial concerns for large prosecutor's offices such as the CCSAO, where different prosecutors perform different tasks at different stages of a prosecution from initiation to trial. It could substantially undermine the application of absolute immunity, particularly as a result of artful pleading, for those prosecutors involved most closely at the initiation stage of a prosecution, unduly inhibiting the performance of their duties and, consequently, unduly impinging on the office's function to vigorously prosecute crime.

In *Van de Kamp*, this Court recently found that a difference in the "pattern of liability," *see Van de Kamp*, 129 S. Ct. at 862, among individual prosecutors who work as a team should not defeat the immunity applicable to trial prosecutors for the violation of a trial based right, such as the failure to turn over *Brady* material. *Van de Kamp* rejected a *per se* rule that absolute prosecutorial immunity does not apply simply because a prosecutor's conduct may be characterized as "administrative." The net effect of *McGhee* is to move the basis for liability back in time from the alleged violation of respondents' rights at trial (*i.e.*, the introduction of allegedly fabricated evidence) to a time that can arguably be characterized as "investigative." *McGhee* declares that the conduct before trial (*i.e.*, the procurement of the alleged false testimony) violates respondents' substantive due process rights. Such a result effectively

narrows the immunity available under *Imbler* and, thus, subjects the prosecutors to liability.

Van de Kamp examined the practical implications of *Imbler's* functional approach where a plaintiff characterizes a prosecutor's conduct as "administrative" in the attempt to avoid the application of immunity to his or her claim based on the withholding of evidence at trial. Similarly, this case presents the practical implications of respondents' attempt to characterize petitioners' conduct as "investigative" to avoid the application of immunity to respondents' claims, as those claims are really based on the presentation of evidence at trial.

In order to illustrate the scope of absolute immunity in application to the claims in *Van de Kamp*, this Court posited a hypothetical case involving supervisory or other prosecutors, but not administration, to explain the scope of immunity as set forth in *Imbler* as it applies to individual prosecutors in a prosecutor's office. This Court stated:

> Suppose . . . [plaintiff] had brought such a case, seeking damages not only from the trial prosecutor but also from a supervisory prosecutor *or from the trial prosecutor's colleagues* – all on the ground that they should have found and turned over the [*Brady* material]. *Imbler* makes clear that *all these prosecutors would enjoy absolute immunity from such a suit.* The prosecutors' behavior, taken individually or separately, would involve "[p]reparation . . . for . . . trial," and would be

> "intimately associated with the judicial phase of the criminal process" because it concerned the evidence presented at trial. And all of the considerations that this Court found to militate in favor of absolute immunity in *Imbler* would militate in favor of immunity in such a case.

129 S. Ct. at 862 (internal citations omitted)(emphasis supplied). This Court emphasized:

> The only difference we can find between *Imbler* and our hypothetical case lies in the fact that, in our hypothetical case, a prosecutorial supervisor or colleague might himself be liable for damages *instead of* the trial prosecutor. But we cannot find that difference (in the pattern of liability among prosecutors within a single office) to be critical.

129 S. Ct. at 862 (emphasis in original). *Imbler* and *Van de Kamp* show that any result other than absolute immunity for all facets of the prosecution effort from Felony Review through trial essentially undermines the entire grant of absolute, prosecutorial immunity.

Thus, as this Court clarified in *Van de Kamp*, *Imbler* stands for the proposition that not only the trial prosecutor, but the other nonsupervisory line assistants in the office not involved in the prosecution would be entitled to immunity as well. As this Court explained, it was not enough simply to characterize prosecutor's

conduct as administrative in the case before it, because the claims:

> focus on a certain kind of administrative obligation – a kind that itself is directly connected with the conduct of a trial. Here, unlike with other claims related to administrative decisions, an individual prosecutor's error in plaintiff's specific criminal trial constitutes an essential element of the plaintiff's claim. The administrative obligations at issue here are thus unlike administrative duties concerning, for example, workplace hiring, payroll administration, the maintenance of physical facilities, and the like.

Van de Kamp, 129 S. Ct. at 862.

In sum, *Van de Kamp* teaches that the purpose of prosecutorial immunity is to protect the office's function in prosecuting criminal cases, rather than just an individual prosecutor. Shifting grants of immunity for different members of the prosecution team should not be used to defeat immunity, because:

> We do not see how such differences in the pattern of liability among a group of prosecutors in a single office could alleviate *Imbler's* basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks. Moreover, this court has pointed out that "it is the interest in protecting the proper functioning of the office,

> rather than the interest in protecting its occupant, that is of primary importance." [Citation omitted.] Thus, we must assume that the prosecutors in our hypothetical suit would enjoy absolute immunity.

Ibid.

With nearly 900 attorneys, the CCSAO is the second largest county prosecutor's office in the nation, second only to Los Angeles County.[4] Given the size of the CCSAO and the number of felony cases arising in Cook County on an annual basis, the CCSAO created Felony Review for the purpose of reviewing cases upon referral or inquiry from law enforcement agencies to determine whether the CCSAO will approve initiation of felony charges in a particular case.

The duties of assistant state's attorneys assigned to Felony Review typically involve interviewing witnesses (including a suspect upon consent after having been read his or her *Miranda* rights), reviewing evidence gathered by the police in their investigation, deciding what information is necessary for trial, preparing a felony review card, and approving or declining to approve felony charges. *See Hampton v. City of Chicago*, 349 F. Supp. 2d 1075, 1081 (N.D. Ill. 2004) (observing that prosecutors assigned to Felony Review interview witnesses, decide what information was necessary for trial, prepare a felony review card,

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4. See website for the Cook County State's Attorney's Office at http://statesattorney.org/about_the_office.htm (visited July 15, 2009).

interview suspects, read suspects their *Miranda* rights and approve charges against suspects). *See also Anderson v. Simon*, 217 F.3d 472, 473 (7th Cir. 2000)(assistant state's attorney from Felony Review assigned to determine whether suspect to be charged with felony burglary).

Prosecutors assigned to Felony Review work in conjunction with other prosecutors within the CCSAO, including supervisors and the trial prosecutors, in initiating and presenting the State's case at trial. Under *Imbler*, assistant state's attorneys assigned to Felony Review have been found entitled to immunity for their conduct in reviewing evidence and approving charges in felony cases. *See, e.g., Hunt v. Jaglowski*, 926 F.2d 689 (7th Cir. 1991) (holding that a Felony Review prosecutor who took a suspect's statement, who was told by the suspect that the statement was coerced and who decided to approved felony charges performed a prosecutorial function and was, therefore, absolutely immune from suit); *see also Spiegel v. Rabinovitz*, 121 F.3d 251, 256 (7th Cir. 1997) (holding that a prosecutor who "simply evaluated the evidence assembled" including "review[ing] the police records, interview[ing] the parties involved and then pass[ing] on his assessment of the case to his superior" performed a prosecutorial function and was, therefore, absolutely immune from suit).

In one case, a litigant attempted to characterize the conduct of a prosecutor assigned to Felony Review as "investigative" where the prosecutor determined insufficient evidence existed to support criminal charges and declined to approve charges until certain further

investigative steps were taken by the police. *Anderson v. Simon*, 217 F.3d 472 (7th Cir. 2000). In *Anderson*, plaintiff's decedent committed suicide while being held in the police lockup pending charging, after his arrest for burglary. The prosecutor from Felony Review had refused to approve charges until after a lineup was held, leading police to detain the suspect overnight. The Seventh Circuit held that this was a prosecutorial decision, not investigative, and the prosecutor was entitled to absolute immunity from suit under Section 1983 for his decision not to approve charges, stating that "[l]ike the assistant state's attorney in *Spiegel*, [the defendant assistant state's attorney] reviewed and weighed the evidence, and he determined that additional evidence was necessary to support a felony burglary charge." *Anderson*, 217 F.3d at 476.

The role of Felony Review is a practical illustration of Justice Kennedy's observation in *Buckley*:

> Two actors can take part in similar conduct and similar inquiries while doing so for different reasons and to advance different functions. It may be that a prosecutor and a police officer are examining the same evidence at the same time, but the prosecutor is examining the evidence to determine whether it will be persuasive at trial and of assistance to the trier of fact, while the police officer examines the evidence to decide whether it provides a basis for arresting a suspect. The conduct is the same, but the functions distinct.

509 U.S. at 289 (Kennedy, J., concurring in part and dissenting in part). Police typically call Felony Review

after they have investigated a crime and identified or arrested a suspect, against whom they seek approval of felony charges. For violent felonies, this involves going to the police station. Hence, assistant state's attorneys interview witnesses and suspects and review evidence at the police station, although they are doing so on behalf of the CCSAO for the purpose of determining whether a prosecution will be initiated and whether the evidence can sustain the State's burden of proof at trial. This is generally the first step in initiating a felony prosecution in Cook County.

Without immunity for performing prosecutorial functions such as calling a witness at trial, prosecutors would, in many cases, be reluctant to call witnesses who might change their testimony. That is why *Imbler* held that prosecutors are immune from suit based upon charges that they suborned perjury. Similarly, a prosecutor assigned to Felony Review would understandably be reluctant to take a statement from a witness or suspect if that prosecutor could later be sued based upon an allegation of coercion or fabrication of evidence. Prosecutors on felony review who perform the prosecutorial functions of interviewing witnesses, taking statements from such witnesses and evaluating evidence need the protection of absolute prosecutorial immunity just as much as trial prosecutors.

In his partial concurrence and dissent in *Buckley*, Justice Kennedy raised the concern that, with respect to actions preparatory to a prosecution, a narrow construction limiting absolute immunity to the actual initiation of charges and prosecution would convert the

substantial protection afforded prosecutors into little more than a pleading rule, explaining:

> Almost all decisions to initiate prosecution are preceded by substantial and necessary out-of-court conduct by the prosecutor in evaluating the evidence and preparing for its introduction, just as almost every action taken in the courtroom requires some measure of out-of-court preparation. Were preparatory actions unprotected by absolute immunity, a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.

Buckley, 509 U.S. at 283 (Kennedy, J., concurring in part and dissenting in part). This concern is paramount for a large prosecutor's office, such as the CCSAO, where the fact that a different prosecutor was involved in the approval of charges than in the trial provides another target for a plaintiff sorting among "patterns of liability" among prosecutors in the office. The Eighth Circuit's decision below takes this concern one step further by allowing a plaintiff who alleges that the introduction of allegedly fabricated evidence at trial injured him to reframe his claim to characterize the conduct of the prosecutor preparing the objectionable evidence as "investigatory" and recognizing an actionable claim at that juncture to avoid the application of immunity.

Felony Review was designed to screen and manage the flow of cases that are charged for felony prosecution. Assignment to Felony Review typically occurs early in a prosecutor's progression through the CCSAO. The threat of civil liability for the prosecutor's role in reviewing cases and approving felony charges on behalf of the CCSAO can be an extremely inhibiting factor in the exercise of the independent judgment, particularly in close cases. The prosecutors assigned to Felony Review often have to make quick initial judgments about the sufficiency of evidence and the credibility of witnesses when deciding whether to approve charges, particularly when a suspect is in custody. The rule from *McGhee* can only serve to chill the independent judgment of these prosecutors. Moreover, the availability of punitive damages in individual capacity Section 1983 actions further contributes to this chilling effect.

McGhee presents large prosecutor's offices with a difficult dilemma: not assigning prosecutors to criminal cases at their early stages or not approving charges in close cases out of fear of collateral civil litigation. As this Court has explained, immunity recognized in *Imbler* does not exist to help prosecutors in the easy case. Instead, "it exists because the easy cases bring difficult cases in their wake. And, as *Imbler* pointed out, the likely presence of too many difficult cases threatens, not prosecutors, but the public, for the reason that it threatens to undermine the necessary independence and integrity of the prosecutorial decision making process." *Van de Kamp*, 129 S. Ct. at 864.

Prosecutors on Felony Review perform the important function of speaking with witnesses, evaluating evidence and ensuring that charges are brought only in cases where the evidence warrants such charges. Consequently, a diminution of the prosecutor's role at the early stages of criminal cases only serves to harm the general public. In this regard, *McGhee* represents a substantial departure from the principles of absolute, prosecutorial immunity set forth in *Imbler* and *Van de Kamp* and should, therefore, be reversed.

CONCLUSION

Amicus respectfully requests that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed in a manner which protects prosecutorial immunity for prosecutors who are assigned to criminal matters early in the process, like prosecutors on Felony Review.

Respectfully submitted,

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